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DISTRICT I

April 18, 2023

To:

Hon. Glenn H. Yamahiro
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Michael Mayer
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Daniel J. O'Brien
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You are hereby notified that the Court has entered the following opinion and order:

2022AP16-CR State of Wisconsin v. Shun Warren (L.C. # 2002CF3088)

Before Brash, C.J., Dugan and White, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. Rule 809.23(3).

Shun Warren appeals the orders of the circuit court denying his motion for sentence modification or resentencing and his motion for reconsideration.[1] The court found that Warren failed to establish a new factor for sentence modification, and that his motion for resentencing was procedurally barred. Based upon our review of the briefs and record, we conclude at

[1] These motions were before the Honorable Glenn H. Yamahiro; other judges presided over Warren's plea and sentencing and his previous postconviction proceedings. We refer to them all generally as the circuit court.

conference that this case is appropriate for summary disposition. *See* WIS. STAT. § 809.21(1) (2021-22).[2] We summarily affirm.

Warren entered a no contest plea in October 2002 to first-degree reckless homicide using a dangerous weapon, as a party to a crime, for the shooting death of Dashan Morrow in June 2002. The State's case was based in part on a custodial statement by Stormi Dixon a few days after the shooting. Dixon stated that he was with Warren on the day of the shooting, and had given his gun to Warren. Warren had then called Morrow to buy some marijuana. Dixon said that Warren subsequently told him that he and a man called "Big Dog" were going to rob Morrow.

When Morrow arrived, Dixon stated that he saw Warren get into Morrow's car and start fighting with him. Dixon said he had started walking away when he heard a gunshot, and then saw Warren get out of the car with a black bag and run away. Dixon stated that he found out shortly thereafter that Morrow was dead.

Warren was initially charged with first-degree intentional homicide using a dangerous weapon, as a party to a crime. After plea negotiations, however, he entered a plea of no contest to an amended charge of first-degree reckless homicide using a dangerous weapon, as a party to the crime. At the plea hearing, Warren explained to the circuit court that he did not remember all of the facts surrounding the shooting because he had been intoxicated. However, during the review of the allegations in the criminal complaint, the court confirmed that Warren remembered

[2] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

shooting Morrow during a "scuffle over the gun," and that Warren understood that his actions "caused [Morrow's] death recklessly."

Nevertheless, Warren sought to withdraw his plea prior to sentencing. He claimed that he "was not fully aware of the factual allegations in the complaint, particularly those concerning his alleged plan to rob [Morrow]." He, therefore, argued that his plea was not knowing and voluntary.

The circuit court denied the motion. The court pointed out that whether Warren was planning to rob Morrow was irrelevant for purposes of proving first-degree reckless homicide. The court also observed that Warren had agreed with those facts that were relevant to that charge during the plea colloquy. Furthermore, the court noted that because Warren was entering a no contest plea, he did not have to actually agree with the facts in the complaint; he was simply not contesting them.

Additionally, the circuit court found that the State would be prejudiced if Warren was allowed to withdraw his plea at that point because Dixon, who was going to testify for the State, had already been sentenced for being a felon in possession of the gun that was used in the shooting; therefore, the State would have no leverage to compel Dixon to testify. Warren was subsequently sentenced to thirty years of initial confinement to be followed by ten years of extended supervision.

Warren appealed, arguing that the circuit court erred in denying his motion to withdraw his plea. This court affirmed, agreeing with the circuit court that the facts Warren admitted during the plea colloquy "support the charge to which he pled." *See* ***State v. Warren***, No. 2003AP2493-CR, unpublished slip op. and order at 5 (WI App Apr. 11, 2005).

Warren subsequently filed a *pro se* WIS. STAT. § 974.06 motion in November 2006, again seeking plea withdrawal. He argued that his trial counsel "coerced" him into entering his plea, that counsel was ineffective for failing to obtain a psychological evaluation of him for his mental health issues until after the plea was entered, and that the sentence was unduly harsh because the circuit court had held his motion for plea withdrawal against him. The circuit court denied the motion, and this court affirmed, concluding that Warren's claims were procedurally barred because they either had already been litigated, or they should have been raised in his direct appeal. *See* ***State v. Warren***, No. 2008AP1481, unpublished slip op. ¶1 (WI App June 23, 2009).

Fifteen years later, in September 2021, Warren filed the motions for sentence modification or resentencing underlying this appeal. The "new factor" proffered for sentence modification was an affidavit from Dixon in which he recanted his statement that Warren planned to rob Morrow. Warren argued that this justified a reduction in his sentence. In the alternative, he asserted that the circuit court had relied on this "'robbery' narrative" in sentencing him; specifically, Warren noted that the circuit court had made reference to him stealing drugs and a wallet from Morrow, but that Morrow's wallet was found by police when they found his body. Warren contends this indicates that the circuit court relied on inaccurate information, a violation of his due process rights requiring resentencing.

The circuit court rejected the affidavit as a new factor, noting that at the sentencing hearing, the court did not "reference or rely on Dixon's statements to police." Furthermore, the court found that sentence modification was not warranted because the "undisputed facts" surrounding the incident supported Warren's conviction for first-degree reckless homicide since he admitted to shooting Morrow numerous times, causing his death. Warren subsequently filed a motion for reconsideration, arguing that the circuit court had not considered his motion for

resentencing. The court denied that motion as well, observing that the argument for resentencing was based on the same set of facts and thus, "the outcome would be the same," and further, that Warren's resentencing claim was procedurally barred because he did not raise it in his previous postconviction proceedings. Warren appeals.

First, with regard to Warren's motion for sentence modification, the circuit court reviewed that motion by applying the two-prong test set forth in ***State v. Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. Under that test, a defendant must demonstrate, by clear and convincing evidence, the existence of a new factor. ***Id.*** This is a question of law that we review independently. *See* ***id.***

For the second prong of the test, the circuit court must determine, in its discretion, whether the new factor justifies sentence modification. ***Id.***, ¶37. The circuit court may consider either prong first, and if the defendant fails to satisfy one prong of the new factor test, the court need not address the other. *See* ***id.***, ¶38. Put another way, if the circuit court determines, pursuant to the second prong, that the alleged new factor would not justify sentence modification, the court "need not determine whether the facts asserted by the defendant constitute a new factor as a matter of law." ***Id.***

We review the circuit court's discretionary decision relating to the second prong of ***Harbor*** for an erroneous exercise of discretion. ***Id.***, ¶33. In other words, unless the trial court made an error of law, or failed to explain its reasoning for concluding that "the facts … presented did not justify modification" of the defendant's sentence, this court will not disturb its decision. *See* ***id.***, ¶63.

We agree with the circuit court's conclusion that sentence modification is not warranted here, based on the undisputed facts of this case. The elements of first-degree reckless homicide required the State to prove that Warren caused the death of Morrow under circumstances that showed an "utter disregard for human life." *See* WIS. STAT. § 940.02(1) (2001-02). The facts that Warren admitted to at the plea hearing—shooting Morrow numerous times causing his death, after which he fled the scene without "summoning help or rendering aid"—established the elements of first-degree reckless homicide, regardless of whether Warren intended to rob Morrow. Therefore, we conclude that the circuit court did not erroneously exercise its discretion in determining that sentence modification was not warranted since Dixon's affidavit did not affect Warren's admission to facts that support the crime to which he pled no contest. *See* ***Harbor***, 333 Wis. 2d 53, ¶63.

With regard to Warren's argument for resentencing, he is procedurally barred from raising this claim. When a defendant presents a new claim for collateral review that was not brought in prior postconviction proceedings and appeals, he or she must demonstrate that there is a "sufficient reason" that the claim was not previously raised. ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 185-86, 517 N.W.2d 157 (1994). Whether a defendant has alleged a sufficient reason for failing to raise an available claim earlier is a question of law that we review *de novo*. *See* ***State v. Romero-Georgana***, 2014 WI 83, ¶30, 360 Wis. 2d 522, 849 N.W.2d 668.

Warren concedes that the information that Morrow's wallet was not stolen at the time of the shooting was available at the time of his plea proceedings. Thus, his resentencing claim could have been raised in a previous postconviction proceeding, and Warren provides no reason for failing to raise it previously other than that "he was told at his plea hearing that the robbery narrative was insignificant." This is not a sufficient reason for failing to previously raise this

claim in prior postconviction proceedings, and we decline to address this claim when doing so would "run counter to the design and purpose" of the sufficient reason rule, which is to promote "finality in our litigation." *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185.

Therefore, we reject Warren's arguments that he is entitled to sentence modification or resentencing. Accordingly, we affirm the circuit court's orders denying his motion for sentence modification or resentencing, and his motion for reconsideration.

Therefore, upon the foregoing,

IT IS ORDERED that the orders are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals